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Income Tax Considerations in Florida Personal Injury Actions

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The author examines the admissibility of evidence showing the effect of the exemption from federal income tax on damage awards for lost earnings. He includes a procedure for incorporating income tax considerations into the calculation of the present value of an inflation-adjusted, lost earnings award. Also analyzed, under both federal and Florida law, is the propriety of a jury instruction that no part of a lost earnings award is subject to federal income tax.

I. INTRODUCTION

Section 104(a)(2) of the Internal Revenue Code provides that the amount of any damages received in compensation for personal injuries is not taxable income.[1] As a result of this provision, two distinct tax issues typically arise whenever a personal injury case is presented to a jury. First, is evidence showing the effect of the section 104 tax exemption on the plaintiff's claim for lost future earn-

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1. I.R.C. § 104(a)(2) (1976 & Supp. V 1981), concerning compensation for injuries or sickness, provides:

> (a) **In general**
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> Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include—
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> . . . .
>
> (2) the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness.

Neither compensatory nor punitive damages awarded for personal injuries are taxable. Rev. Rul. 75-45, 1975-1 C.B. 47.

ings admissible? Second, should the jury be instructed that any damages it awards for the personal injury are tax exempt? In some cases the courts have confused these two questions, even though they are analytically distinct.[2]

II. I.R.C. § 104 AND THE CALCULATION OF LOST FUTURE EARNINGS

A. *The Arguments*

Several courts have considered the inherent inequity of a damage claim for lost future earnings that does not include evidence of the substantial monetary gain realized by virtue of the section 104 tax exemption. For example, in *Burlington Northern, Inc. v. Boxberger*,[3] the United States Court of Appeals for the Ninth Circuit ruled that the trial court should have admitted evidence regarding the plaintiff's income tax liabilities in a claim based upon future gross earnings. The court based its decision on the rationale that "the just and elementary rule that the primary aim in measuring damages for a tort should place the injured person as near as possible in the condition he would have occupied had the wrong not occurred."[4] The court noted that if the plaintiff had not been injured, it would have been "wholly unrealistic" to assume that he could have avoided paying income taxes on his gross earnings.[5] Therefore, allowing evidence of the gross earnings to go to the jury without any reduction for income taxes can produce an unfairly exaggerated lost income damage figure. As will be discussed, the failure to consider taxes may yield too small an award in some cases.

The *Boxberger* court discussed and distinguished the apparently contrary rule suggested in *McWeeney v. New York, New Haven & Hartford Railroad.*[6] The United States Court of Appeals for the Second Circuit in *McWeeney* held that income taxes should not be considered in reducing a monetary award for damages in that particular case, but left the door open for cases in which the

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2. *See, e.g.*, Burlington N., Inc. v. Boxberger, 529 F.2d 284, 296 (9th Cir. 1975); Domeracki v. Humble Oil & Ref. Co., 443 F.2d 1245, 1250 (3d Cir.), *cert. denied*, 404 U.S. 883 (1971); *see also* Comment, *Income Taxation and the Calculation of Tort Damage Awards: The Ramifications of* Norfolk & Western Railway v. Liepelt, 38 WASH. & LEE L. REV. 289, 290 n.13 (1981).

3. 529 F.2d 284 (9th Cir. 1975).

4. *Id.* at 291 (citing C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 560 (1935)).

5. *Id.*

6. 282 F.2d 34 (2d Cir.), *cert. denied*, 364 U.S. 870 (1960).

taxes would make a significant difference to the magnitude of the award.[7] By 1975, a number of other circuit courts had endorsed the *McWeeney* rule. The Ninth Circuit in *Boxberger* thus declined to reject *McWeeney* outright, but instead applied the Second Circuit's exception, finding that in the case before it, "the impact of income taxes ha[d] a significant substantial effect" on the final damage award.[8] The court thus admitted evidence of the tax consequences and the section 104 exemption. The court noted, however, that "as a matter of fairness and logic, the just approach would require a rule providing for the admissibility of evidence of, and corresponding deduction to account for, future income taxes in *all* cases."[9]

In its opinion, the *Boxberger* court analyzed the three reasons suggested by *McWeeney* for not allowing consideration of the tax issue. First, the court rejected arguments that including computation of the plaintiff's future tax liability was too speculative[10] or too complex for the average jury, noting the sophistication of today's jurors and the highly tax-conscious nature of society in general. Second, the *Boxberger* court also rejected the argument that not considering income taxes was a substitute for assessment of the impact of inflation.[11] Finally, the court noted that attorney's fees had no relation to the jury's task of estimating future income, because such fees were generally not recoverable as a part of the plaintiff's case.[12]

The United States Supreme Court applied the compelling rea-

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7. *Id.* at 38.

8. The opinion discussed the evolution of the *McWeeney* rule, noting that some cases held that the impact of future taxes was "substantial" for income ranges of $15,000 to $20,000 or $16,000 to $25,000, as contrasted with cases in which the impact was not considered substantial when the incomes were $4,800, $6,300, or $11,150 annually. 529 F.2d at 294. The court also indicated that inflation's erosion of these incomes' purchasing power should not affect the decision to deduct income taxes; that determination turned on the proportional tax "bite," which had remained relatively constant. *Id.* at 294 n.10.

9. *Id.* at 294 (emphasis in original). Considering tax consequences for plaintiffs in high tax brackets, while ignoring them otherwise has been characterized as avoiding large injustices while permitting small or middle-sized injustices. *See* Johnson v. Penrod Drilling Co., 510 F.2d 234, 242 (5th Cir.) (Gee, J., dissenting), *cert. denied*, 423 U.S. 839 (1975). One student commentator argues for applying such a deduction to all lost earnings cases. 46 U. CIN. L. REV. 297 (1977).

10. 529 F.2d at 292-93. Of course, there would be no speculation as to tax liability for lost earnings that have accrued by the time of trial because the tax rates would be known. Several jurisdictions admit tax evidence on past income, but not on future income. *See, e.g.*, Varlack v. SWC Caribbean, Inc., 550 F.2d 171, 178 (3d Cir. 1977) (applying Virgin Islands law); Beaulieu v. Elliott, 434 P.2d 665, 673 (Alaska 1967).

11. 529 F.2d at 293; *see infra* text accompanying notes 42-53.

12. 529 F.2d at 293-95.

soning of *Boxberger* in *Norfolk & Western Railway v. Liepelt*.[13] There the Supreme Court reversed a lower court decision excluding evidence of the income tax effect on lost earnings, concluding that "the wage earner's income tax is a relevant factor in calculating the monetary loss suffered."[14] The Supreme Court rejected the argument that evidence as to after-tax earnings was too speculative or complex for a jury. Likewise, the Court reasoned that under the "American rule," a prevailing party does not recover attorney's fees from the opponent.[15]

In addition to citing the unpredictability[16] and complexity[17] of tax calculations, some courts have suggested that section 104(a)(2) reflects a deliberate congressional intent to award a tax windfall on lost wages for injured plaintiffs.[18] The majority in *Liepelt* explicitly rejected this congressional intent argument and found nothing in the language of section 104(a)(2) or its legislative history to suggest such an intent.[19]

B. *The Effect of* Liepelt

Although both *Boxberger* and *Liepelt* were Federal Employer's Liability Act (FELA) cases, there is no logical distinction that differentiates them from any other personal injury case involving lost income. Both cases involved fatal injuries, but again, there is no logical distinction between a claim for lost earnings made by the decedent's survivors in a wrongful death action and the claim for substantial lost earnings made by one who was seri-

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13. 444 U.S. 490 (1980).

14. *Id.* at 494. The Supreme Court suggested that tax evidence need not be permitted in every case, particularly when the impact of future income tax in calculating the award would be "de minimis." *Id.* at 494 n.7. In *Liepelt* the decedent's gross earnings for the eleven months before his death in November 1973 amounted to $11,988, and would have been $16,828 in 1977. *Id.* at 491-92.

15. *But see* Johnson v. Penrod Drilling Co., 510 F.2d 234, 241 n.1 (5th Cir.) (Gee, J., dissenting) (even in the absence of instruction, jurors consider "that lawyers must be paid"), *cert. denied*, 423 U.S. 839 (1975).

16. *See, e.g.*, Domeracki v. Humble Oil & Ref. Co., 443 F.2d 1245, 1250 (3d Cir.), *cert. denied*, 404 U.S. 883 (1971); Beaulieu v. Elliott, 434 P.2d 665, 673 (Alaska 1967).

17. *See, e.g.*, Johnson v. Penrod Drilling Co., 510 F.2d 234, 236-37 (5th Cir.), *cert. denied*, 423 U.S. 839 (1975).

18. *E.g.*, Raines v. New York Cent. R.R., 51 Ill. 2d 428, 430, 283 N.E.2d 230, 232 (citing Hall v. Chicago & Nw. Ry., 5 Ill. 2d 135, 151-52, 125 N.E.2d 77, 86 (1955)), *cert. denied*, 409 U.S. 983 (1972); *see also* Norfolk & W. Ry. v. Liepelt, 444 U.S. 490, 500-03 (1980) (Blackmun, J., dissenting).

19. 444 U.S. at 496 n.10. Thus, the majority did not ignore this rationale, as suggested in Comment, *supra* note 2, at 297. *See also* 21 SANTA CLARA L. REV. 873, 878 (1981).

ously injured.[20] Indeed, some prior decisions required consideration of evidence on income tax effects in non-FELA cases and situations in which the plaintiff survived.[21]

Subsequent to *Liepelt*, the Supreme Court stated that the tax holdings of that case were not limited to FELA cases. The district courts applied *Liepelt* in calculating permanently injured plaintiffs' lost income damages in non-FELA cases involving maritime and state law.[22] Later, in *Gulf Offshore Co. v. Mobil Oil Corp.*,[23] the Supreme Court articulated a general federal common-law rule in a case involving a nonfatal injury. Most recently, in *Fanetti v. Hellenic Lines, Ltd.*,[24] the Second Circuit extended *Liepelt* to all claims for future wages based solely on federal law. Relying on "economic fairness," the court stated that a jury can be charged to assume a future tax amount comparable to the past tax amount.[25] To establish the amount of taxes the plaintiff would have incurred, there must be either a stipulation of future taxes in the record or evidence of past taxes. The court stated that the burden is on the defendant to present this evidence "in timely and proper fashion."[26]

It appears clear, however, that a federal court will not apply

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20. *But see* Erickson v. United States, 504 F. Supp. 646, 652 (S.D.S.D. 1980). The *Erickson* court held that *Liepelt*'s deduction for income taxes did not apply to an injury case in which a wage earner's recovery is based on gross earnings, as contrasted with a wrongful death case in which a decedent's dependents receive net income. The court apparently confused the concepts of before- and after-tax income with the concept that surviving dependents are entitled only to net accumulations: the decedent wage earner would have consumed some of his income, while an injured wage earner also should receive the amount he will consume. For a definition of "net accumulations," see FLA. STAT. § 768.18(5) (1981). The income tax question is distinct from that of net accumulations and is applicable in both wrongful death and injury cases.

21. *E.g.*, Hooks v. Washington Sheraton Corp., 578 F.2d 313, 318 (D.C. Cir. 1977) (injury from diving into hotel swimming pool); Turcotte v. Ford Motor Co., 494 F.2d 173, 184-86 (1st Cir. 1974) (applying Rhode Island wrongful death statute); Tenore v. Nu Car Carriers, Inc., 67 N.J. 466, 341 A.2d 613 (1975).

22. *See, e.g.*, Nesmith v. Texaco, Inc., 491 F. Supp. 561 (W.D. La. 1980); Roselli v. Hellenic Lines, Ltd., 524 F. Supp. 2, 4 (S.D.N.Y. 1980) (injury under the federal Longshoreman's and Harbor Workers' Compensation Act); *see also* Rother v. Interstate & Ocean Transp. Co., 540 F. Supp. 477, 486 (E.D. Pa. 1982); Weiland v. Pyramid Ventures Group, 511 F. Supp. 1034, 1043 (M.D. La. 1981).

23. 453 U.S. 473, 487 n.17 (1981). In *Gulf Offshore*, the Court held that *Liepelt* was to be applied retroactively. *See* 453 U.S. at 486 n.16; *see also* Lang v. Texas & Pac. Ry., 624 F.2d 1275, 1279 (5th Cir. 1980). *Contra* Fulton v. St. Louis-S.F. Ry., 675 F.2d 1130 (10th Cir. 1982); Dunn v. St. Louis-S.F. Ry., 621 S.W.2d 245, 254 (Mo. 1981), *cert. denied*, 454 U.S. 1145 (1982).

24. 678 F.2d 424 (2d Cir. 1982).

25. *Id.* at 431.

26. *Id.* at 432.

federal common law to cases controlled by state law when the state's law differs. This was the holding in *Croce v. Bromley Corp.*,[27] a case arising out of the fatal airplane crash of singer Jim Croce. The United States Court of Appeals for the Fifth Circuit reasoned that the federal concerns expressed in *Liepelt* were not present in a case arising under Louisiana's wrongful death statute,[28] and found no suggestion that *Liepelt* required giving the instruction in wrongful death actions under state law.[29] Other circuit courts reached the same conclusion,[30] while one state supreme court observed that *Liepelt* was not based on constitutional grounds.[31] This view was apparently confirmed in *Gulf Offshore Co. v. Mobil Oil Corp.*, in which the United States Supreme Court remanded to the Texas state court the issue of whether Louisiana's law, controlling in the case, required that the jury be instructed that personal injury damages were not subject to federal income taxation; if the instruction was not required, the court was to decide whether *Liepelt* displaced the state rule in cases arising under the Outer Continental Shelf Lands Act.[32]

Prior to *Liepelt*, the clear majority rule did not require (or permit) the admission of evidence regarding the income tax savings to plaintiffs.[33] One commentator, citing *Liepelt*, observed that "the recent trend in tort suits for wrongful death is toward deduction of

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27. 623 F.2d 1084 (5th Cir. 1980), *cert. denied*, 450 U.S. 981 (1981).

28. The Fifth Circuit also determined that *Liepelt*'s favorable dicta regarding inflation did not compel it to allow inflation evidence. *Id.* at 1096-98. *But cf.* Culver v. Slater Boat Co., 688 F.2d 280 (5th Cir. 1982) (prohibiting evidence on inflation in ascertaining future damages is unfair); *see also infra* text accompanying notes 42-52.

29. Croce v. Bromley Corp., 623 F.2d at 1097.

30. *See, e.g.*, Vasina v. Grumman Corp., 644 F.2d 112, 118 (2d Cir. 1981); Estate of Spinosa, 621 F.2d 1154, 1158-59 (1st Cir. 1980); *see also* Kennelly, *The Effect of Income Taxes Upon Earnings in Wrongful Death and Permanent Disability Cases—An Update*, 25 TRIAL LAWYER'S GUIDE 77, 77-96 (1981) (includes excerpts from the oral argument in *Liepelt*).

31. South v. National R.R. Passenger Corp., 290 N.W.2d 819, 827 (N.D. 1980) (no indication *Liepelt* was to apply retroactively and no decision as to whether *Liepelt* should be followed in future cases governed by state law). The United States Supreme Court has since held that *Liepelt* is to be applied retroactively. *See supra* note 23; *see also* Barnette v. Doyle, 622 P.2d 1349, 1366 (Wyo. 1981) (*Liepelt* does not control the procedural instruction issue); Comment, *supra* note 2, at 299-301.

32. 453 U.S. 473 (1981), *vacating in part* 594 S.W.2d 496 (Tex. Civ. App. 1979). The case involved the application of 43 U.S.C. § 1332(2) (1976), which mandates that state laws apply as federal laws in certain proceedings under the Act. On remand, the Texas court concluded that Louisiana did not require the instruction and that *Liepelt* did not displace the state role in an OCSLA case. 628 S.W.2d 171 (Tex. Civ. App. 1982).

33. *See, e.g.*, Annot., 63 A.L.R. 2D 1393, 1398-404 (1959); *cf.* Annot., 16 A.L.R. 4TH 589 (1982) (discussing post-*Liepelt* cases).

taxes an individual pays on his income prior to the calculation and present value discounting of the future lost earnings."[34] In the two years since *Liepelt*, however, published opinions referring to that case have generally been federal diversity cases adhering to the prevailing state law on tax evidence.[35] One state supreme court has cited *Liepelt* while reaffirming its prior ruling requiring the admission of evidence.[36] Other opinions suggest that *Liepelt* has had an impact.[37] For example, in *Grant v. City of Duluth*,[38] the United States Court of Appeals for the Eighth Circuit reversed the district court on the basis of *Liepelt*, holding that the district court was to instruct the jury that any damages awarded would not be subject to income taxes. Although contrary to the Minnesota Supreme Court's prior decisions on this issue, the Eighth Circuit held that its decision was justified because the Minnesota precedents antedated *Liepelt*.[39] Interestingly, the Minnesota Supreme Court discussed *Liepelt* just two weeks later in *Marynik v. Burlington Northern, Inc.*,[40] an FELA case, but did not indicate what effect, if any, *Liepelt* would have on state law. The *Marynik* court stated that the failure to give an instruction on the nontaxability of the damage award was error, although on the facts of the case, the er-

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34. Krause, *Structured Settlements for Tort Victims*, 66 A.B.A. J. 1527, 1528 (1980) (citation omitted). More common are articles criticizing *Liepelt*'s evidence holding, *see, e.g.*, Comment, *supra* note 2, or both the evidence and instruction rulings. *See, e.g.*, Kennelly, *supra* note 30. *But see* 21 SANTA CLARA L. REV. 873 (1981).

35. *See, e.g.*, Fenasci v. Travelers Ins. Co., 642 F.2d 986, 989 (5th Cir. 1981), *cert. denied*, 454 U.S. 1123 (1982); Croce v. Bromley Corp., 623 F.2d 1084 (5th Cir. 1980), *cert. denied*, 450 U.S. 981 (1981); Gerbich v. Evans, 525 F. Supp. 817, 819 (D. Col. 1981); cases cited *supra* note 26; *see also* Reuter v. United States, 534 F. Supp. 731 (W.D. Pa. 1982) (following Pennsylvania law in not allowing reduction for income tax); *In re* Air Crash Disaster Near Chicago, Ill., 526 F. Supp. 226, 231 (N.D. Ill. 1981) (submission of evidence and instruction on taxation would necessitate forecasting Illinois law, a process the court described as "only slightly more reliable than predictions of the future arrived at by reading the entrails of sheep"); *cf.* Louissant v. Hudson Waterways Corp., 111 Misc. 2d 122, 443 N.Y.S.2d 678 (Sup. Ct. 1981). In *Louissant* the state trial court followed prior New York law in not allowing a tax deduction. It also sought to distinguish a recent New York case, Gilliard v. New York City Health & Hosp. Corp., 77 A.D.2d 532, 430 N.Y.S.2d 308 (1980), which had not cited *Liepelt*, but in reducing a wrongful death award, had noted that the decedent would have paid income and social security taxes.

36. Curtis v. Finneran, 83 N.J. 563, 569, 417 A.2d 15, 18 (1980).

37. *See, e.g.*, Austin v. Loftsgaarden, 675 F.2d 168, 183 (8th Cir. 1982); Pesses v. Superior Court, 107 Cal. App. 3d 117, 122, 165 Cal. Rptr. 680, 683 (1980); Delmarva Power & Light Co. v. Burrows, 435 A.2d 716, 721 (Del. 1981); *In re* Eader, 24 Ohio Op. 3d 83, 85, 434 N.E.2d 757, 759 (Ct. Cl. 1982).

38. 672 F.2d 677 (8th Cir. 1982).

39. *Id.* at 683.

40. 317 N.W.2d 347 (Minn. 1982).

ror was harmless.[41]

C. *Taxes and Inflation*

An analysis of cases decided before *Liepelt* and *Boxberger* indicates that some courts viewed the inadmissibility of tax evidence as a fair trade-off for the inadmissibility of evidence on inflation.[42] In *Tenore v. Nu Car Carriers, Inc.*,[43] the New Jersey Supreme Court ruled unanimously that the trial court must permit a plaintiff to introduce evidence about inflation. Likewise, the court must allow a defendant the opportunity to cross-examine the plaintiff's witnesses to elicit testimony concerning income tax liability or to develop the matter by extrinsic evidence.

Traditionally, trial courts have not allowed juries to consider inflation in setting damage awards.[44] But many courts have recently departed from that tradition, as exemplified by *Tenore*. Florida's District Court of Appeal for the Second District[45] was among the vanguard admitting evidence on inflation, observing that jurors probably would consider it even in the absence of any evidence. In *Seaboard Coast Line Railroad v. Garrison*,[46] the Second District rejected the United States Court of Appeals for the Fifth Circuit's view, enunciated in *Johnson v. Penrod Drilling Co.*,[47] that evidence on inflation was too speculative to be admitted.[48] Perhaps persuaded by the trend among other federal courts to assess the effect of inflation, the Fifth Circuit recently overruled *Johnson*. After rehearing en banc *Culver v. Slater Boat Co.*[49] and *Byrd v. Heinrich Schmidt Reederei*,[50] the Fifth Circuit held that

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41. *Id.* at 351.

42. *See, e.g.*, McWeeney v. New York, N.H. & H.R.R., 282 F.2d 34 (2d Cir. 1960); *see also* Burlington N., Inc. v. Boxberger, 529 F.2d 284, 293 (9th Cir. 1975).

43. 67 N.J. 466, 341 A.2d 613 (1975).

44. *See* Note, *Future Inflation, Prospective Damages, and the Circuit Courts*, 63 VA. L. REV. 105, 125 (1977); 62 CORNELL L. REV. 803 (1977).

45. Seaboard Coast Line R.R. v. Garrison, 336 So. 2d 423 (Fla. 2d DCA 1976); *see also* Bould v. Touchette, 349 So. 2d 1181, 1185 (Fla. 1977) (citing *Garrison* with approval); *cf.* Griesemer v. Prathers, Inc., 413 So. 2d 68 (Fla. 2d DCA 1982) (reaffirming *Garrison* and using consideration of inflation as basis for affirming jury verdict in excess of economist's calculation of lost earnings). *See generally* Oberhofer, *Wrongful Death Act Settlements*, 56 FLA. B.J. 613 (1982) (discussing the effects of changing inflation and interest rates on wrongful death settlements).

46. 336 So. 2d 423, 424 (Fla. 2d DCA 1976).

47. 510 F.2d 234, 236 (5th Cir. 1975). The *Johnson* court also asserted that the prediction of tax consequences was "too speculative." *Id.* at 236-37.

48. 336 So. 2d at 423-24.

49. 688 F.2d 280 (5th Cir. 1982) (en banc), *rev'g* 644 F.2d 460 (5th Cir. 1981).

50. 688 F.2d 344 (5th Cir. 1982) (en banc), *rev'g* 638 F.2d 1300, 1308 (5th Cir. 1981).

prohibiting evidence on inflation in ascertaining future damages was unfair.[51]

The United States Court of Appeals for the Second Circuit, which decided *McWeeney,* recently ruled in *Doca v. Marina Mercante Nicaraguense, S.A.* that trial courts should now consider inflation in estimating the present value of lost future wages.[52] Thus, that court now has eroded one of the bases for not considering taxes. The Second Circuit termed *Liepelt* "instructive" when mentioning the court's previous rejection of a deduction for taxes in *McWeeney.*

D. *Calculating Inflation and Taxes*

Some courts have presumed that the rate of inflation equals the discount rate or the anticipated interest on investment, so that the finder of fact can disregard both.[53] This "total offset method" may contribute to "judicial efficiency," but is often criticized as imprecise.[54]

Other methods of calculation allow expert testimony regarding inflation and discount rates. A court may allow future damages for each year to be increased at the rate of inflation and then have each year's inflated damages reduced to present value at the discount rate. This two-step method has been called the "independent incorporation method."[55]

The "offset method" is another procedure for considering both inflation and investment earnings.[56] Under this method, the court subtracts the inflation rate from the discount rate to arrive at an "inflation-adjusted discount rate." This rate is then used to discount the future damages to present value.[57] The court in *Feldman v. Allegheny Airlines*[58] used this calculation after a percentage of the award representing the income tax exemption had been subtracted.[59]

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51. *Culver,* 688 F.2d at 305.

52. Doca v. Marina Mercante Nicaraguense, S.A., 634 F.2d 30, 36-39 (2d Cir. 1980).

53. *See, e.g.,* Pfeifer v. Jones & Laughlin Steel Corp., 678 F.2d 453, 461 (3d Cir. 1982); Beaulieu v. Elliot, 434 P.2d 665, 671 (Alaska 1967); 62 CORNELL L. REV. 803, 808 (1977).

54. *See, e.g.,* Note, *supra* note 44, at 127-28.

55. *Id.* at 111.

56. *Id.*

57. Feldman v. Allegheny Airlines, 382 F. Supp. 1271, 1293-94 (D. Conn.), *aff'd,* 524 F.2d 384 (2d Cir. 1974); Note, *supra* note 44, at 123; 62 CORNELL L. REV. at 810.

58. 524 F.2d 384 (2d Cir. 1975) (forecasting Connecticut law).

59. The inflation-adjusted (offset) calculation generally will produce a slightly smaller lump sum than the two-step independent incorporation method. *See* Note, *supra* note 44, at

Some courts have addressed the actual mathematics of calculating the tax deduction, although a comprehensive method has not been formulated.[60] To compensate a plaintiff adequately, the calculation would need to indicate that interest earned on the invested principal would be taxable,[61] and would need to "add back" those taxes.[62] An acceptable procedure incorporating tax considerations into the inflation/present value calculation of the sum to be awarded for lost income would be as follows:[63] First, determine

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111. One commentator favors the offset method because of its simplicity and its utilization of the historical differential between interest and inflation rates. 62 CORNELL L. REV. at 814, 816. The Florida Second District Court of Appeal favorably cited the *Feldman* inflation-adjusted approach in Seaboard Coast Line R.R. v. Garrison, 336 So. 2d 423, 425 n.4 (Fla. 2d DCA 1976), because it is more readily understood by juries. Furthermore, the difference in results may not be significant in light of other variables such as the uncertainty of future inflation and earnings rates, and whether the discount rate is based on "risk-free" investments.

60. *See, e.g.*, De Lucca v. United States, 670 F.2d 843 (9th Cir. 1982) (also computing taxes paid on interest from award); *see supra* notes 53-54 and accompanying text; *see also* Hooks v. Washington Sheraton Corp., 578 F.2d 313, 318 (D.C. Cir. 1977); Felder v. United States, 543 F.2d 657, 672-74 (9th Cir. 1976) (also considering effects of income tax shelters in calculations); Roselli v. Hellenic Lines, Ltd., 524 F. Supp. 2, 4 (S.D.N.Y. 1980); Abille v. United States, 482 F. Supp. 703, 711 (N.D. Cal. 1980) (applying Alaska law and calculating taxes only as to past earnings); Armentrout v. Virginia Ry., 72 F. Supp. 997 (S.D. W. Va. 1947), *rev'd on other grounds*, 166 F.2d 400 (4th Cir. 1948); Henderson, *Some Recent Decisions on Damages, with Special Reference to Questions of Inflation and Income Taxes*, 40 INS. COUNSEL J. 423, 437 (1973).

61. *See, e.g.*, O'Shea v. Riverway Terminal Towing Co., 677 F.2d 1194, 1201 (7th Cir. 1982); Hollinger v. United States, 651 F.2d 636, 642 (9th Cir. 1981); McWeeney v. New York, N.H. & H.R.R., 282 F.2d 34, 37 (2d Cir. 1960); *see also* Norfolk & W. Ry. v. Liepelt, 444 U.S. 490, 495 (1980). Kennelly argues that giving an instruction that awards are not taxable is prejudicial to plaintiffs because it ignores the fact that interest earned on the awards is taxable. Kennelly, *supra* note 30, at 100. This is a non sequitur, however, since the quid pro quo for considering taxes on interest earned would be first to consider taxes that would be paid on the earnings portion of the award. These are both evidentiary matters, while the cautionary instruction discussed below can and should be given, even in the absence of any evidence as to taxes.

62. Morris & Nordstrom, *Personal Injury Recoveries and the Federal Income Tax Law*, 46 A.B.A. J. 274 (1960). See Ward & Olson, *The Economic Impact of Income Tax on Damage Awards*, TRIAL, Aug. 1981, at 47, 48-49, which also observes that in the case of a plaintiff-survivor, the taxes on the interest may be paid at a higher rate because the taxpayer might then be single, rather than married and filing a joint return. This might be alleviated to some extent by the Internal Revenue Code's provisions for surviving spouses. The Ninth Circuit affirmed such an add-back of taxes on interest earned in De Lucca v. United States, 670 F.2d 843 (9th Cir. 1982).

63. As in considering inflation and present value, one would expect that many of these calculations would be presented in expert testimony. *See, e.g.*, Hooks v. Washington Sheraton Corp., 578 F.2d 313, 318 (D.C. Cir. 1977); Burlington N., Inc. v. Boxberger, 529 F.2d 284, 293 (9th Cir. 1975); Roselli v. Hellenic Lines, Ltd., 524 F. Supp. 2, 4 (S.D.N.Y. 1980); Corboy, *Economic Experts in Tort Litigation*, LITIGATION, Winter 1982, at 28; Morris & Nordstrom, *supra* note 62, at 328.

gross income for future years (including increases for inflation); second, compute taxes on that income; third, subtract taxes from gross income to yield net income;[64] and fourth, reduce net income to present value.[65]

If the computation ceased at this point, the present values could simply be added to obtain the principal awarded for lost future income. But, this would not consider possible taxes to be paid on the interest derived from the principal. To include this, the calculation would continue: fifth, the interest earned on the principal sum in a given year would be calculated by multiplying the interest rate times the principal remaining in the given year.[66] Finally, the taxes on this interest would then be discounted to present value and added back to the principal to be awarded.

The final step does not reflect that the amount added back for taxes on the interest will earn interest that will also be taxed. This will produce a shortfall, requiring a further addition to the tax addback. Also, the addback for total taxes on interest is based on the assumption that the plaintiff would not have invested any of his annual earnings (and thus not have paid taxes on interest earned) in the absence of being injured. Theoretically, the tax addback should not include the taxes on such interest. As when only present value and inflation are considered, the assumptions of the trier of fact (or the expert) affect all of the figures.

A simplified example illustrates the effects of this procedure:

> 1) Assume lost gross income of $60,000 per year for ten years.
>
> 2) The plaintiff is married, filing jointly with his spouse, and has two minor dependents. Based on 1981 tax rates (assuming no income from his spouse and no itemization of deductions), taxes would be $17,718 per year.

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64. In a wrongful death case, a deduction would also be made for the decedent's personal consumption. *See* Corboy, *supra* note 63, at 31; Henderson, *supra* note 60, at 437; *see also* FLA. STAT. § 768.18(5) (1981).

65. This procedure essentially adopts the independent incorporation approach to inflation, since the gross income in step 1 adds inflation and the present value calculation in step 4 reduces it. The inflation-adjusted (offset) approach could be used by not increasing the gross income in step 1 for inflation, and then by using an inflation-adjusted present value rate in step 4.

66. The interest rate used in this computation would be the rate that was assumed for the purpose of making the present value reduction in step 4. The amount awarded to the plaintiff for that year would be composed of that interest and as much of the principal necessary to reach the total awarded for the year. *See infra* note 67.

3) Net income per year would equal $42,282 ($60,000 - $17,718).

4) Assuming an annual interest rate of 8%, then to obtain a payment of $42,282 per year for ten years, the sum of the present values would equal $283,717.

5) The 8% interest on the principal sum would range from $22,697 in the first year to $3,132 in the final year. Thus, $42,282 in year 1 would be the sum of the $22,697 in interest plus $19,585 of the principal. This would leave $264,132 principal in the second year to earn interest at 8%. The calculations are summarized in the table on the following page.

6) The taxes on the interest (using the assumptions in step 2 above) would range from $2,912 in the first year to zero in the last two years. Discounted to present value, these taxes would total $9,837.

Therefore, in this example, failing to add back the taxes paid on interest earned would result in the plaintiff being underpaid by approximately $9,837. But failing to consider taxes at all would result in the defendant overpaying by more than $109,000.[67] In different situations, however, the consideration of the income tax effects, including tax addbacks, may actually produce a larger award.[68]

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67. $60,000 per year gross income reduced to present value, assuming 8% interest, would result in a principal payment of $402,605, as contrasted with the fully tax-adjusted award of $283,717 + $9,837 (tax add-back) = $293,554. Thus, the true savings to a defendant in this situation from considering taxes is $109,051 (the gross award of $600,000 would have included $177,180 of tax liability, but this would be reduced to present value along with the rest of the award). See Corboy, *supra* note 63, at 31, which includes an example using lower annual earnings and a longer work life expectancy, resulting in an overall increase of the award when taxes on the lost income and on the interest from the award are considered, and Henderson, *supra* note 60, at 440-41, which includes a tabular calculation that also deducts personal expenses in a wrongful death case, but does not add back taxes on interest, although these considerations are recognized as a factor. *See also* Ward & Olson, *supra* note 62, at 49.

68. Actually, as noted *supra* p. 653, the failure of this example to consider the taxes accruing on interest earned on the tax addback results in a shortfall of approximately another $640.00. The failure to make these further refinements in other applications (such as a longer life span or an increasing wage rate) may be more significant. For their assistance in developing this procedure, the author is indebted to Dr. Jane K. Elligett of the University of South Florida, and Dr. Gary Anderson of the University of Miami, who is presently preparing an article that will present a more detailed economic analysis of these considerations.

EQUIVALENT OF LOST GROSS INCOME OF $60,000 FOR 10 YEARS

	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8	Year 9	Year 10	Total
Lost Gross Income	60,000	60,000	60,000	60,000	60,000	60,000	60,000	60,000	60,000	60,000	600,000
Income Taxes*	17,718	17,718	17,718	17,718	17,718	17,718	17,718	17,718	17,718	17,718	177,180
Net income to be matched	42,282	42,282	42,282	42,282	42,282	42,282	42,282	42,282	42,282	42,282	422,820
Present value of $42,282 (assuming 8% interest)	39,150	36,250	33,565	31,079	28,776	26,645	24,671	22,844	21,152	19,585	283,717
Total principal for investment in year *n*	283,717	264,132	242,981	220,137	195,466	168,821	140,045	108,967	75,402	39,152	
Interest on principal (8% total principal in year *n*)	22,697	21,131	19,438	17,611	15,637	13,506	11,204	8,717	6,032	3,132	139,105**
Balance from principal needed to total $42,282	19,585	21,151	22,844	24,671	26,645	28,776	31,078	33,565	36,250	39,150	283,715**
Taxes on interest in year *n*	2,912	2,536	2,146	1,763	1,357	973	567	184	0	0	12,438
Present value of taxes	2,696	2,174	1,704	1,296	924	613	331	99	0	0	9,837

*1981 tax rate.

**The total interest paid plus total amount used from principal each year equal $422,820, which was the total income to be matched.

III. Jury Instruction on Income Tax

The multi-step tax deduction calculation contrasts with the simplicity of a jury instruction that no portion of the award to the plaintiff is subject to federal income taxation.[69] As noted above, in claims for wrongful death or personal injuries, any damages awarded (whether for lost future income or other elements of damages) are not subject to federal income tax by virtue of section 104 of the Internal Revenue Code. Numerous courts and commentators have noted the tendency among juries to increase awards because of the erroneous assumption that any amount awarded will be subject to taxation.[70] Judge Gee of the United States Court of Appeals for the Fifth Circuit has described the tax-exempt status of such awards as a "relatively occult piece of information which jurors are unlikely to know."[71] The court in *Burlington Northern, Inc. v. Boxberger* stated,

> We cannot believe that, in the absence of such an instruction, many jurors would not assume that the award would be taxable and thus be inclined to increase their damage award accordingly. The benefits of informing the jury of the true tax consequences are so clear, and the burden in terms of time and the possibility of confusion so minimal, that we believe the balance is overwhelmingly in favor of giving such an instruction. To put the matter simply, giving the instruction can do no harm, and it can certainly help by preventing the jury from inflating the award and thus overcompensating the plaintiff on the basis of an erroneous assumption that the judgment will be taxable.[72]

The United States Supreme Court in *Liepelt* quoted the last sentence from the *Boxberger* excerpt above and added,

> We hold that it was error to refuse the requested instruction in this case. That instruction was brief and could be easily

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69. Indeed, several courts have required the giving of the tax instruction while not requiring or permitting evidence of the tax windfall in lost income awards. *See, e.g.*, Domeracki v. Humble Oil & Ref. Co., 443 F.2d 1245, 1250-51 (3d Cir.), *cert. denied*, 404 U.S. 883 (1971); Dempsey v. Thompson, 251 S.W.2d 42, 45 (Mo. 1952). The wording of the requested instruction in *Liepelt* was: "[Y]our award will not be subject to any income taxes, and you should not consider such taxes in fixing the amount of your award." 444 U.S. 490, 492 (1980). For a slightly different variation previously used in Florida, see Poirier v. Shireman, 129 So. 2d 439, 442 (Fla. 2d DCA 1961).

70. *See, e.g.*, Norfolk & W. Ry. v. Liepelt, 444 U.S. 490, 496-97 (1980); Burlington N., Inc. v. Boxberger, 529 F.2d 284, 296-97 (9th Cir. 1975) (observing that the instruction is favored by an "overwhelming majority" of commentators); Domeracki v. Humble Oil & Ref. Co., 443 F.2d 1245, 1251 (3d Cir.), *cert. denied*, 404 U.S. 883 (1971); Tenore v. Nu Car Carriers, Inc., 67 N.J. 466, 495, 341 A.2d 613, 629 (1975).

71. Johnson v. Penrod Drilling Co. 510 F.2d 234, 241 (5th Cir.) (Gee, J., dissenting), *cert. denied*, 423 U.S. 839 (1975).

72. Burlington N., Inc. v. Boxberger, 529 F.2d 284, 297 (9th Cir. 1975).

> understood. It would not complicate the trial by making additional qualifying or supplemental instructions necessary. It would not be prejudicial to either party, but would merely eliminate an area of doubt or speculation that might have an improper impact on the computation of the amount of damages.[73]

Subsequently, in *Gulf Offshore*, the Supreme Court observed that "failure to give the instruction may lead to the plaintiff recovering a windfall award."[74] Additionally, the refusal to allow both evidence regarding taxes and a jury instruction presents the danger of doubling the tax error. Describing this danger, the court in *Boxberger* said,

> The trial court's denial of both . . . requests (to present evidence of the impact of future income taxation on future earnings, and to instruct the jury that the earnings award would not be taxable) had the possible effect of overcompensating the claimants by twice awarding taxes—once by using gross income to measure lost earnings and a second time, if the award was increased upon the fallacious assumption that an additional increment was needed to compensate for income taxes to be paid from the award.[75]

State courts' reaction to both *Liepelt*'s evidentiary and instruction rulings has been surprisingly mixed, especially with regard to the latter.[76] In two types of situations, some courts have

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73. 444 U.S. at 498; *see also* Burlington N., Inc. v. Boxberger, 529 F.2d 284, 297 (9th Cir. 1975); Domeracki v. Humble Oil & Ref. Co., 443 F.2d 1245, 1251 (3d Cir.), *cert. denied*, 404 U.S. 883 (1971); Tenore v. Nu Car Carriers, Inc., 67 N.J. 466, 495, 341 A.2d 613, 629 (1975).

74. Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 486 n.16 (1981).

75. 529 F.2d at 297; *see also* Johnson v. Penrod Drilling Co., 510 F.2d 234, 242 n.4 (5th Cir.) (Gee, J., dissenting), *cert. denied*, 423 U.S. 839 (1975).

76. Blanchfield v. Dennis, 292 Md. 319, 438 A.2d 1330, 1334 (1982) (refusal to give instruction was error); Griffin v. General Motors Corp., 1980 Mass. Adv. Sh. 937, 403 N.E.2d 402, 407-08 (1980) (instruction not required when tax issue not injected through evidence or counsels' comments); Tennis v. General Motors Corp., 625 S.W.2d 218, 226-28 (Mo. Ct. App. 1981) (refusal to give instructions supported by committee's comment that recently amended standard jury instruction on income tax was to be used only in FELA cases); Scallon v. Hooper, 293 S.E.2d 843, 845 (N.C. Ct. App. 1982) (jury instruction on tax effects analogous to collateral source rule); South v. National R.R. Passenger Corp., 290 N.W.2d 819, 827 (N.D. 1980) (following its earlier opinion not permitting instruction, but making no decision as to future state law cases); Dehn v. Prouty, 321 N.W.2d 534, 539 (S.D. 1982) (3-2 decision upholding trial court's refusal to give instruction); Barnette v. Doyle, 622 P.2d 1349, 1367 (Wyo. 1981) (instruction not required).

In Grant v. City of Duluth, 672 F.2d 677, 683 (8th Cir. 1982), the United States Court of Appeals for the Eighth Circuit held that in diversity cases, the jury instruction must be given in the absence of a contrary state decision issued subsequent to *Liepelt*. The last forum state case to consider the question, a 1978 pre-*Liepelt* Minnesota decision, had held that it was not error to refuse the instruction. Two weeks after the Eighth Circuit's decision, the Minnesota Supreme Court held that the failure to give an instruction in a FELA case

not required that the trial judge give a tax instruction: (1) when evidence or counsels' comments had not injected into the case the question of taxation;[77] or (2) when the jury was not instructed regarding attorney's fees.[78] The rationales cannot withstand scrutiny in either of these situations. First, as noted above, the question of an award's taxability is likely to be ever-present in the juror's mind, even when evidence about taxes has not been presented during the trial. Thus, if the instruction is given, it will correct misconceptions that already exist. Second, to say that jurors are not instructed that a plaintiff must pay his attorney is simply no response in light of the American rule that generally does not permit payment of attorney's fees to the prevailing party. Quite simply, it is illogical to argue that not giving an attorney's fee instruction is a trade-off for the tax instruction when the parties are not entitled to attorney's fees, but are entitled to an award not distorted because of a jury's erroneous view of the tax laws.

Twenty years ago, University of Florida law student, Jack R. Schoonover, who is currently a judge on Florida's Second District Court of Appeal, advocated that courts should give a nontaxability instruction regardless of the nature of the award.[79] Florida courts had not ruled on whether to follow the majority or minority rule with respect to lost income awards. Judge Schoonover observed that the typical instruction (that any award is not subject to income taxation and thus taxes should not be considered in fixing the amount of the award) would have to be modified or supplemented in cases where jurors were to consider evidence of income tax savings on the lost income portion of the award.[80]

IV. FLORIDA LAW

In *Poirier v. Shireman*,[81] Florida's Second District Court of Appeal upheld the propriety of a jury instruction stating that any award given to the plaintiff would not be taxable. In *Poirier* the trial court gave the instruction, and the plaintiff appealed, arguing that the damages awarded were inadequate.[82] The appellate court

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was a harmless error. Marynik v. Burlington N., Inc., 317 N.W.2d 347, 351 (Minn. 1982).

77. *See, e.g.*, Griffin v. General Motors Corp., 1980 Mass. Adv. Sh. 937, 403 N.E.2d 402, 407 (1980).

78. *See, e.g.*, South v. National R.R. Passenger Corp., 290 N.W.2d 819, 827 (N.D. 1980); Barnette v. Doyle, 622 P.2d 1349, 1367 (Wyo. 1981).

79. Note, *Instructing the Jury Not to Consider Income Taxation in Personal Injury Award*, 15 U. FLA. L. REV. 128, 131 (1962).

80. *Id.* at 133.

81. 129 So. 2d 439 (Fla. 2d DCA 1961). For a brief discussion of *Poirier* and its implications, see 16 U. MIAMI L. REV. 126 (1961).

82. 129 So. 2d at 440.

held that the giving of the instruction was not error. This decision was later followed by the Third District Court of Appeal.[83]

Two district courts of appeal have addressed the question whether a court must give an instruction on income taxes when counsel requests it. Both courts held that under the facts of the cases, it was a matter of discretion for the trial court as to whether it is proper to give the requested instruction.[84] The court in *Atlantic Coastline Railroad v. Braz*[85] observed that it might have been proper to give the requested instruction, but did not find "on the facts involved" that it was required, when $185,000 was awarded.[86] Similarly, in *St. Johns River Terminal Co. v. Vaden*,[87] the court held that the instruction need not be given unless the matter of income tax liability had been injected into the case.[88] Of course, if the plaintiff's expert witness presents gross income figures, this necessarily injects the evidentiary issue of income tax liability (or lack of it) into a case. More importantly, as noted above, the modern jury is likely to assume a tax liability exists in the absence of an instruction.

In *Baptist Memorial Hospital, Inc. v. Bell*,[89] the trial court awarded a new trial for several reasons, including the possibility that the jury weighed the tax consequences of its damage award. The First District Court of Appeal reversed the new trial order, noting that the court clearly instructed the jury that tax matters were not to be considered.[90] The Florida Supreme Court subsequently reversed the First District's opinion and reinstated the new trial order.[91]

Florida's wrongful death statute and the recently adopted cor-

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83. Stager v. Florida E. Coast Ry., 163 So. 2d 15, 18 (Fla. 3d DCA 1964).

84. St. Johns River Terminal Co. v. Vaden, 190 So. 2d 40 (Fla. 1st DCA 1966), *cert. denied*, 200 So. 2d 814 (Fla. 1967); Atlantic Coastline R.R. v. Braz, 182 So. 2d 491 (Fla. 3d DCA 1966), *quashed on other grounds*, 196 So. 2d 109 (Fla. 1967).

85. 182 So. 2d 491 (Fla. 3d DCA 1966), *quashed on other grounds*, 196 So. 2d 109 (Fla. 1967).

86. *Id.* at 495.

87. 190 So. 2d 40 (Fla. 1st DCA 1966), *cert. denied*, 200 So. 2d 814 (Fla. 1967).

88. *Id.* at 42. In dicta the *Vaden* court suggested that lost earnings should be based on gross income, citing the congressional intent, conjecture, and complication rationales. *Id.* Comment, *supra* note 2, at 290 n.13, mentions *Vaden* as an example of a decision that confused the evidence and instructions issues. *Vaden* was an FELA case, which in light of *Liepelt* would no longer be followed in other cases in which federal law controls, since the United States Supreme Court has now ruled that a court must give a tax instruction. Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 487 n.17 (1981). In Flanigan v. Burlington N., Inc., 632 F.2d 880, 886-87 n.2 (8th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981), the court mentioned *Vaden* as one of a long list of cases overruled by *Liepelt*.

89. 384 So. 2d 145 (Fla. 1980).

90. 363 So. 2d 28, 29 (Fla. 1st DCA 1978), *rev'd*, 384 So. 2d 145 (Fla. 1980).

91. 384 So. 2d at 146.

responding jury instruction define a decedent's net accumulations specifically in terms of income "after taxes."[92] Applying Florida law, the United States Court of Appeals for the Sixth Circuit cited this statute in holding that a trial court did not err in reducing the damages awarded by the amount of the decedent's future income tax liability.[93] Indeed, in light of the statute, it appears that when a plaintiff in a wrongful death case has used gross income figures, the trial court would have to allow evidence on the income tax savings.[94]

Therefore, aside from wrongful death cases, Florida has no definitive position on tax evidence at this time, and it is within the trial court's discretion whether to give the instruction. To date, Florida's courts have not indicated how they will proceed on the tax evidence and instruction issues in light of the Supreme Court's recent reexamination of the question in *Liepelt*.

V. CONCLUSION

Florida's concern with the accuracy of damage awards for personal injuries is reflected in its wrongful death statute, which allows for the consideration of inflation and dictates that net income should be used to calculate lost future income. The emphasis should be on accurate awards, given that a consideration of income taxes may increase, as well as decrease, the award. The complexity of the calculation may vary according to the amounts involved and whether there would be significant taxes paid on the interest to be earned from the principal sum. Thus, income tax evidence may not be appropriate in cases where it would not significantly affect the award. Nevertheless, there is no persuasive reason for refusing to give a simple jury instruction in personal injury actions to the effect that *any* amount awarded is not subject to taxation. An instruction on taxation should take its place among Florida's standard jury instructions.

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92. FLA. STAT. § 768.18(5) (1981); FLA. STANDARD JURY INSTRUCTIONS (Civ.) 6.4(c) (1980).

93. Downs v. United States, 522 F.2d 990, 1005 (6th Cir. 1975).

94. A student article cited FLA. STAT. ANN. § 768.18(5) (West Supp. 1976) for the proposition that it required the deduction of income taxes from wrongful death awards. 62 CORNELL L. REV. 803, 815 (1977). In a recent wrongful death case, the net accumulation was computed after taxes. Griesemer v. Prathers, Inc., 413 So. 2d 68 (Fla. 2d DCA 1982). The court in Leaseco, Inc. v. Bartlett, 257 So. 2d 629 (Fla. 4th DCA 1971), *cert. denied*, 262 So. 2d 447 (Fla. 1972), cited dicta in *Vaden* without discussion for the principle that in the wrongful death action before it, earnings could be based on gross earnings rather than net earnings after taxes. But *Leaseco* and *Vaden* arose before the effective date of FLA. STAT. § 768.18(5) (1981), under the more general language of its predecessor. The court's refusal in Frazier v. Ewell Eng'g & Contracting Co., 62 So. 2d 51, 53 (Fla. 1952), to sanction a reduction of a widow's damage award is inapposite because the decedent's pension was tax-exempt.